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CONTROL OVER STREET-MEETINGS BY MUNICIPAL AUTHORITIES.—An ordinance of the City of Mt. Vernon, N. Y., prohibited "the congregation of persons in groups or crowds" or "the holding of public meetings upon the public streets of the city" without the mayor's special written permission.[1] In the recent case of *Hays* v. *Atwell* (N. Y. Sup. Ct. Spec. T. 1920) 64 N. Y. L. J. 440, this ordinance was declared void and unconstitutional. Among the powers of the common council specifically enumerated in the city charter was "to prohibit the gathering or assembling of persons upon the public streets of said city".[2] If the ordinance is within the express power granted the city by the legislature, and is to that extent "expressly authorized and approved by the legislature", the general principle is that its reasonableness and fairness cannot be questioned.[3] More interesting, however, than an analysis of the Mt. Vernon charter to determine the validity of the particular ordinance is the broader question raised of the validity of such a measure as a reasonable exercise of the general municipal police power.

That such meetings are the subject of control can hardly be doubted. The highways of the state are under the paramount control of the legislature, whence the municipalities derive their power.[4] In this country, the legislatures usually confer upon the municipal corporations extensive powers over public ways and public places within their limits, sufficient to give them authority to pass necessary and reasonable ordinances for the purpose of keeping the streets free from obstructions and of preventing improper use thereof.[5] For the right of the people to use the streets is limited by the extent and character of that use, and the right of others to use them.[6] Assemblies on the public streets, however, are not unlawful *per se,* but only when constituting a nuisance.[7] Thus an ordinance making it a misdemeanor to "lounge, stand, or loaf" in public places has been held unconstitutional as infringing upon the right of personal liberty and as being unreasonable and oppressive.[8]

The more common type of ordinance, however, avoiding the questions raised by complete prohibition, vests in some city official or group of officials the discretionary power to grant permits for gatherings or processions on the public streets.[9] The courts which have passed upon the propriety of the delegation of this discretion have been dominated by two distinct views of policy. On the one hand, there is a strong line of cases holding that such ordinances are contrary to the spirit of American institutions, unreasonable and void.[10]

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[1] City of Mt. Vernon, N. Y., Ordinances, c. xxi, § 21.

[2] City of Mt. Vernon, N. Y., Charter, Sec. 166(5).

[3] *Matter of Stubb* v. *Adamson* (1917) 220 N. Y. 459, 116 N. E. 372; see *Mader* v. *City of Topeka* (Kan. 1920) 189 Pac. 969, 970. "Where, however, the power to legislate is general or implied, and the manner of exercising it not specified, there must be a reasonable use of such power, or the ordinance may be declared invalid by the court." *Village of Carthage* v. *Frederick* (1890) 122 N. Y. 268, 271, 25 N. E. 480.

[4] See Dillon, *Municipal Corporations* (5th ed. 1911) § 1161.

[5] See Dillon, *loc. cit.*

[6] See *Iverson* v. *Dilno* (1911) 44 Mont. 270, 275, 119 Pac. 719.

[7] *State* v. *Hughes* (1875) 72 N. C. 25 (celebration of Emancipation Proclamation): "In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral." See *City of Chicago* v. *Trotter* (1891) 136 Ill. 430, 432, 26 N. E. 359.

[8] *St. Louis* v. *Glover* (1907) 210 Mo. 502, 109 S. W. 30.

[9] For a general discussion of ordinances vesting unregulated discretion in officers, see (1915) 15 COLUMBIA LAW REV. 63.

[10] *Anderson* v. *Tedford* (Fla. 1920) 85 So. 673; *State ex rel. Garrabad* v. *Dering* (1893) 84 Wis. 585, 54 N. W. 1104 (Salvation Army); *City of Chicago* v. *Trotter, supra,* footnote 7; *Rich* v. *City of Naperville* (1891) 42 Ill. App. 222 (Salvation Army); *Anderson* v. *City of Wellington* (1888) 40 Kan. 173, 19 Pac.

Some of these courts feel that in a popular government it is wise to encourage united effort to attract public attention and challenge examination and criticism of the associated purpose.[11] But even apart from this, many courts object to an ordinance whch lays down no express conditions under which people can move upon the streets and which permits unregulated official discretion which may be used for personal and political purpose. There is also frequent reference to the Fourteenth Amendment.[12] This antipathy is also displayed in decisions on closely related questions of police power, where control of the streets or other places of public resort has been similarly delegated.[13]

On the other hand, the Supreme Court of the United States, in upholding an ordinance forbidding speeches in public parks or grounds without a permit from the mayor, has based the power so to control upon a power of total prohibition.[14] Other courts without assuming this extreme premise find a justification in policy and convenience for the delegation of this discretionary power to forbid or permit use of the streets for purposes other than ordinary traffic.[15] This point of view likewise has been reflected in decisions involving ordinances regulating other subject-matters, but analogous in principle. These cases, dealing with the delegation of such discretionary power over the moving of buildings upon public places,[16] the use of the streets by public service corporations,[17] the playing of musical instruments on the streets,[18] and other matters meriting regulation,[19] are frequently referred to as controlling the disposition of cases like the

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719 (Salvation Army); *Matter of Frazee* (1886) 63 Mich. 396, 30 N. W. 72 (aimed at Salvation Army); *In re Gribben* (1897) 5 Okla. 379, 47 Pac. 1074 (Salvation Army).

[11] See *State ex rel. Garrabad* v. *Dering, supra,* footnote, 10, p. 590.

[12] In *State ex rel. Garrabad* v. *Dering, Anderson* v. *City of Wellington,* and *Matter of Frazee, supra,* footnote 10, certain organizations were excepted from the provisions of the ordinance, thereby raising the additional objection that it was, on its face, discriminatory.

[13] *Matter of Application of Dart* (1916) 172 Cal. 47, 155 Pac. 63 (soliciting for private charities; Salvation Army); *Little Chute* v. *Van Camp* (1908) 136 Wis. 526, 117 N. W. 1012 (keeping open of saloons during certain hours); *Los Angeles* v. *Hollywood Cem. Assn.* (1899) 124 Cal. 344, 57 Pac. 153 (establishment or enlargement of cemeteries); *cf. Smith* v. *Hosford* (Kan. 1920) 187 Pac. 685 (the erection of garages); *State* v. *Tenant* (1892) 110 N. C. 609, 14 S. E. 387 (the erection of any buildings); *cf. Mayor, etc. of Baltimore* v. *Radecke* (1878) 49 Md. 217 (the operation of steam engines).

[14] *Davis* v. *Massachusetts* (1897) 167 U. S. 43, 17 Sup. Ct. 731.

[15] *City of Buffalo* v. *Till* (1920) 192 App. Div. 99, 182 N. Y. Supp. 418: "no person shall participate in any parade, gathering, assemblage, or demonstration upon any street, square, park . . . which gathering has not been authorized by a written permit from the mayor;" violation by socialist. *Fitts* v. *City of Atlanta* (1905) 121 Ga. 567, 49 S. E. 793, (socialist); *Love* v. *Judge of Recorder's Court* (1901) 128 Mich. 545, 87 N. W. 785; *Commonwealth* v. *Abrahams* (1892) 156 Mass. 57, 30 N. E. 78; *City of Bloomington* v. *Richardson* (1890) 38 Ill. App. 60, (*semble*). The court here held that an ordinance prohibiting public meetings without a permit from the mayor did not affect an impromptu gathering around two members of the Salvation Army. The court, in defining a public meeting, stated that it must be open to the general public, that notice thereof must be given in a manner adapted to reach the public in general, and that it must have matter of public interest as its subject or object. The court intimated that if "public meeting" were interpreted to mean any gathering in a public place the ordinance would be unreasonable and void.

[16] *Wilson* v. *Eureka City* (1899) 173 U. S. 32, 19 Sup. Ct. 317.

[17] *West. Un. Tel. Co.* v. *Richmond* (1912) 224 U. S. 160, 32 Sup. Ct. 449.

[18] *Wilkes-Barre* v. *Garabed* (1899) 11 Pa. Sup. Ct. 355 (Salvation Army); *In re Flaherty* (1895) 105 Cal. 558, 38 Pac. 981; *Roderick* v. *Whitson* (1889) 51 Hun 620, 4 N. Y. Supp. 112 (Salvation Army).

[19] *People ex rel. Economous* v. *Coakley* (1920) 110 Misc. 385, 180 N. Y. Supp. 376 (the keeping of poolrooms); *People ex rel. Reuther* v. *Sisson* (1917)

present. While it must be admitted that such analogies, especially in the field of police power, are of doubtful value, these cases at least show that this vesting of discretionary power in municipal officials has met with considerable judicial approval.

It is obvious that a group of individuals should not have unrestrained liberty to obstruct the streets and interfere with the free passage of others, equally entitled to the use of the highways. In fact, the most salutary exercise of the police power is that which seeks to forestall the evil, not merely to mitigate its consequences. To frame an ordinance effectively enumerating the exact circumstances under which such gatherings could be held would be extremely difficult, if not impossible. These ordinances are based on the theory that they do not delegate to certain officials the authority belonging to the governing bodies of the cities, but, in the exercise of that authority by the latter, impose on these officials duties appropriate to their offices.[20] They provide an excellent means of giving the municipal authorities notice that the meetings are to be held, thus affording an opportunity to arrange for proper police supervision. That street meetings may be inimical to the welfare of the community is apparent. To prohibit them entirely would not be desirable. Ordinances of the type in question are therefore adopted as a convenient means of safeguarding public welfare without instituting an absolute prohibition. The power of discretion vested in the city officials is not arbitrary in the strict sense of the term. They are simply made the agents of the law and are bound to exercise that power fairly and for the purpose of promoting public welfare.[21] And when they abuse the power by unfairly and arbitrarily refusing to grant permits, they may be compelled to do so by mandamus proceedings and should, as individuals, be held liable for any resultant damages.[22] Where one has been arrested as a result of such misuse of authority, the courts will, in *habeas corpus* proceedings, declare the administration of the ordinance void and order the release of the petitioner.[23] It must be admitted that the exercise of this discretion may frequently be merely the application of social or political prejudgment. And if the court's prejudgment agrees with that of the official, it may not recognize that which, to the petitioner, seems an obvious abuse. Yet, on the whole, these ordinances seem to have advantages sufficient to make them a means reasonably adapted to the solution of the problem of controling the streets. And they should be deemed, at least, a valid exercise of police power.[24]

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101 Misc. 429, 167 N. Y. Supp. 134 (the keeping of saloons); *Fischer* v. *St. Louis* (1904) 194 U. S. 361, 24 Sup. Ct. 673 (the erection of dairies and cowstables); *Municipal Paving Co.* v. *Donovan Co.* (Tex. Civ. App. 1912) 142 S. W. 644 (the operation of steam rollers upon the streets).

[20] *People ex rel. Economous* v. *Coakley, supra,* footnote 19.

[21] See *Municipal Paving Co.* v. *Donovan Co., supra,* footnote 19; *Wilkes-Barre* v. *Garabed, supra,* footnote 18.

[22] *Remington* v. *Walthall* (1910) 82 Kan. 234, 108 Pac. 112; see McQuillan, *Municipal Corporations* (1913) § 2621.

[23] *Yick Wo* v. *Hopkins* (1885) 118 U. S. 356, 6 Sup. Ct. 1064. This case seems to be the bulwark of those denying the validity of the type of ordinance in question. It is submitted that while the case contains some very strong *dicta* in point, the decision did not declare the ordinance void, but simply the administration thereof.

[24] The General City Law of New York State, Cons. Laws (1909) c. 26, § 5, forbids all processions and parades on city streets to the exclusion or interruption of other citizens, except the National Guard, the police and fire departments, and the associations of veteran soldiers without prior notice thereof to police authorities who may then designate how much of the street the parade or procession may occupy. *Cf.* Village Law, Cons. Laws (1909) c. 64, § 90 (6).